

EMPLOYEE/MANAGEMENT RELATIONS

1. REASON FOR ISSUE: To revise Department of Veterans Affairs (VA) policy regarding employee/management relations by including the Health and Human Services sanctions listing as an event requiring removal from VA employment.

2. SUMMARY OF CONTENTS/MAJOR CHANGES: This handbook contains mandatory VA procedures on employee/management relations. The pages in this handbook replace the corresponding pages of VA Handbook 5021 Part I, Chapter 3, and Part VI, Chapter 10. These changes will be incorporated into the electronic version of VA Handbook 5021 that is maintained by the [Office of Human Resources Management website](#).

3. RESPONSIBLE OFFICE: The Human Resources Management Programs and Policies Service (051), Office of the Deputy Assistant Secretary for Human Resources Management.

4. RELATED DIRECTIVE: VA Directive 5021, "Employee/Management Relations."

5. RESCISSIONS: None.

**CERTIFIED BY:
SECRETARY**

**BY DIRECTION OF THE
OF VETERANS AFFAIRS:**

/s/John A. Gauss
Assistant Secretary for
Information and Technology

/s/S. E. Benson
Acting Assistant Secretary for Human
Resources and Administration

5. TYPES OF ADVERSE ACTIONS

a. **Suspension of More Than 14 Calendar Days.** A suspension for more than 14 calendar days is an enforced temporary non-pay status and absence from duty. Such action is given for serious misconduct. It may also be given for continued or repeated acts of misconduct of a less serious nature.

b. **Reduction in Grade for Disciplinary Reasons.** A reduction in grade imposed for disciplinary reasons is proper when such an action would be effective in correcting a situation and thus serve to retain a valuable and trained employee. For example, a reduction in grade may be appropriate when the offense indicates unsuitability for supervisory duties but not for duties of a non-supervisory nature.

c. **Removal for Disciplinary Reasons.** Removal for disciplinary reasons is an involuntary separation taken for serious misconduct or for continued or repeated acts of misconduct of a less serious nature.

d. **Non-Disciplinary Reasons Resulting in Removal or Reduction in Grade or Pay.** An action may be non-disciplinary, but at the same time adverse to the employee. For example, the removal of an employee because of refusal to accompany the activity to a new location is an adverse action even though no disciplinary element is involved. Demotion or separation due to the employee's failure to meet the physical requirements of the position is another example of an adverse action which did not grow out of a disciplinary situation.

e. **Demotion or Removal Based on Combination of Performance and Non-Performance Related Factors.** Adverse actions based on a combination of performance and either misconduct or inability to do the work of the position because of disability, are processed under this chapter. (For pure performance based removals under 5 CFR, part 432, see appendices I-L, I-M and I-N.)

f. **Furlough for 30 Days or Less.** This is a non-disciplinary adverse action taken on the basis of an emergency situation, lack of work or funds, or other non-disciplinary reasons. Furloughs are appropriate only when motivated by temporary conditions. VA Handbook 5005, Staffing, contains procedures for identifying employees for furlough and requesting furlough authority.

[g. **Health and Human Services Sanctions List.** When an employee is excluded by the Health and Human Services Office of Inspector General, they are deemed ineligible for receipt of Federal health care funds for items or services they provide during the period of their exclusion. This includes salary, expenses, and fringe benefits associated with employment. Accordingly, when the name of a VHA employee or non-VHA employee who is paid with VHA funds, is posted on the Health and Human Services sanctions listing, the employee will receive a proposed removal notice immediately and provided rights in accordance with paragraph 7 of this chapter.]

6. BURDEN OF PROOF DURING APPEAL PROCESS

a. Prior to initiating an adverse action, officials involved in the decision-making process should consider the burden of proof, which must be met in order to sustain the adverse action on appeal.

b. When taking an adverse action against an employee, the agency bears the burden of proof under 5 U.S.C. 7701 (c)(1) on all reasons and issues that form the basis for the adverse action.

c. The agency has the burden of proof on the following 3 elements of its decision on all adverse actions taken under 5 U.S.C. 75:

(1) **Proof of Charges.** The agency must prove the factual basis of the misconduct relied on in taking the action by a "preponderance of the evidence." Preponderance of the evidence means that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient

APPENDIX D.
TITLE 5 – SAMPLE NOTICE OF PROPOSED REMOVAL

NOTE: *Applicable for other adverse actions and suspensions of 14 days or less.*

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Proposed Removal

1. It is proposed to remove you from employment with VA based on the following reasons:

I. On (date), at approximately (time), you allowed patient J.D. to bring a bottle of whiskey on the hospital premises despite the fact that it was your duty (under the standing order for guards) to prevent patients from introducing alcoholic beverages on the hospital premises.

The practice of grouping reasons under general headings, such as “Neglect of Duty,” or “Insubordination,” etc., is discouraged.

II. At 10:00 a.m., approximately 1 hour after the incident, you were ordered by your immediate supervisor, Mr. John Smith, to report at once to the Chief, Security Service, and explain your neglect of duty. However, you told Mr. Smith that you refused to do so and, although he repeated the order, you still did not report to the Chief, Security Service.

After each charge, cite specific law, regulation, or policy that has been violated.

[See note 1 for employees on HHS exclusionary list.]

III. At 10:00 a.m., immediately following your refusal to carry out the above-mentioned order, you struck Mr. Smith several times with your fists and knocked him down on the floor.

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing, and to submit affidavits in support of your reply showing why this notice is inaccurate and any other reasons why your removal should not be effected. The evidence on which this notice of proposed action is based will be available for your review in the Human Resources Office, (Room). You will be allowed (give at least 8 or more hours) of official

Only applies when employee is in an active duty status. Must be used in adverse actions. Use “a reasonable amount of official time” for suspension of 14 days or less.

duty time for reviewing the evidence relied on to support the reason(s) in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me. You have the right to be represented by an attorney or other representative.

3. You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it. If you do not understand the above reason(s) why your removal is proposed, contact me, or the Human Resources Management Office (give location) for further explanation.

At least 7 calendar days is permitted, more if justified by circumstances, or required by the negotiated agreement for members of the bargaining unit.

4. On two previous occasions you refused to follow orders given to you by your supervisor. After the first occasion, you were admonished by letter of (date) and after the second, you were reprimanded by letter of (date). This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

Citation of past record is not considered a current reason. Copies of the past record must be included in the evidence file.

[Not applicable for employees on HHS exclusionary list.]

5. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply(ies), if submitted.

6. If it is the decision of the (deciding official) that you be removed, your removal will be effective not less than 30 calendar days from the day after the date of receipt of this notice.

Not needed for suspensions of 14 days or less.

7. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business on (same date as in par. 3 above), if you do not reply.

8. You will be retained in an active duty status during the advance notice period.

[Note 1: The Office of Inspector General of the Department of Health and Human Services (IG/HHS) has made a determination, pursuant to 42 U.S.C. section 1320a-7, to exclude you from participation in Federal health care programs, effective (date). The Veterans Health Administration (VHA) is required to give effect to this decision. Accordingly, VHA is barred from paying you for services furnished on or after the effective date of the exclusion (42 U.S.C. section 1320a-79(c)(2)(A)). This statutory bar includes salary, expenses and fringe benefits associated with your employment.]

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

APPENDIX F. TITLE 5 – SAMPLE DECISION LETTER FOR ADVERSE ACTIONS
(Removal, demotion, suspension for more than 14 calendar days and other adverse actions)

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Removal

1. In connection with the letter of (date) in which you were given advance notice of your proposed removal, a decision has been made to remove you from employment effective (date), based on the following reasons:

Whenever possible, the decision should be delivered at least 5 days prior to the effective date of an adverse action. In every case, the date set must provide for receipt of the decision letter at or prior to the time the action will be effective.

[CITE THE SUSTAINED REASON(S)]

[For employee on exclusionary list, repeat statement from proposal letter.]

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as cited in your notice of proposed removal.

Applicable only if action considers past record.

[Past discipline not applicable for employee on exclusionary list.]

3. I have also considered other factors including your years of service, your past work record, the seriousness of the offenses with which you have been charged, and whether there are any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of removal is appropriate and within the range of reasonableness.

This sample wording pertaining to the decision official's consideration of the "Douglas" factors should be modified according to the specific factors considered and the final decision on the action proposed.

[Not applicable for employee on exclusionary list.]

4. (See app. K for sample for wording on employee appeal rights.)

5. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

6. (Notice of any other matter required by applicable Labor-Management Relations Agreement should be included.)

EMPLOYEE/MANAGEMENT RELATIONS

**PART VI. TITLE 38 SEPARATIONS NOT COVERED BY
PARTS II OR III OF THIS HANDBOOK**

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Department of Veterans Affairs
5021/2
Washington, DC 20420

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Transmittal Sheet
June 26, 2003

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10. FAILURE TO MEET STATUTORY OR REGULATORY REQUIREMENTS. Employees are responsible for maintaining all qualifications required for appointment and for providing evidence of these qualifications, e.g., full and unrestricted licensure in a State, when requested. An employee who fails to meet or who fails to present evidence of meeting the statutory, e.g., 38 U.S.C.7402, or regulatory requirements for appointment will be separated. If it is determined that the employee willfully concealed the lack of or loss of a qualification, e.g., full and unrestricted license in a State, the separation will be made retroactive to the date the qualification was lost; otherwise the separation will be effected upon determination that the statutory or regulatory requirement is not met. The appointment of an individual who did not fully meet all statutory and regulatory requirements at the time of appointment will be canceled immediately upon discovery of the disqualification. The following provisions apply to separations or cancellations for disqualification:

a. The employee will be notified in writing of the separation or cancellation and, when applicable, of the right of review in subparagraph c below by the facility Director. For Central Office employees, the notification will be made by the Under Secretary for Health or designee. The notification should be given directly to the employee and the employee requested to acknowledge receipt, or mailed to the employee by certified mail.

b. In the case of the facility employees in positions centralized to the Under Secretary for Health, the facility Director will immediately notify the Network Director and appropriate Central Office official of the separation or cancellation for failure to meet statutory or regulatory requirements for appointment.

c. Facility employees, whose separations are approved by the facility Director, have the right to seek a post-separation or post-cancellation review of the action by the Network Director. A request for review must be made in writing through the facility Director. It must be delivered to the facility Director or designee by hand or postmarked within 15 calendar days of the date the notification of separation or cancellation was given to the employee or mailed by certified mail. The request for review must be based solely on evidence relating to the failure to meet statutory or regulatory requirements for appointment. If such a review is requested, the facility will forward a complete record of the case along with evidence submitted by the employee to the appropriate Network director.

d. If there is some doubt as to the legality of a facility employee's appointment, the facility Director may request a review by the Under Secretary for Health or designee. Requests for review should be submitted through the appropriate VISN to the Assistant Deputy Under Secretary for Health (10N_/051). If review is requested by the facility, the Director may choose to defer separation of the employee. The employee will be detailed to non-patient care duties while the decision of the reviewing official is pending.

e. Individuals who knowingly and willfully conceal their failure to meet statutory and regulatory requirements may be subject to repayment of monies and benefits received as a result of this concealment.

[f. Individuals whose names appear on the Health and Human Services sanctions listing and are deemed ineligible for receipt of Federal health care funds, will be determined as not meeting statutory requirements. These employees will be notified in writing and discharged immediately.]

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11. PRE-EMPLOYMENT SUITABILITY SEPARATIONS

a. **General.** This paragraph contains procedures which will be used to separate employees appointed under 38 U.S.C. 7306 and 7401(1), for pre-employment suitability reasons unknown to VA officials at the time of appointment; i.e., pre-employment misconduct which is judged to make the employee